STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
	)	
LEOPOLDO ESPARZA,	)	
	)	
	)	
Complainant,	)	CHARGE NO(S): 2005CF3858
	)	EEOC NO(S): N/A
and	)	ALS NO(S): 07-265
	)	
CERTIFIED GROCERS MIDWEST,	)	
	)	
	)	
Respondent.	)	

NOTICE

You are hereby notified that the Illinois Human Rights Commission has not received timely exceptions to the Recommended Order and Decision in the above named case. Accordingly, pursuant to Section 8A-103(A) and/or 8B-103(A) of the Illinois Human Rights Act and Section 5300.910 of the Commission's Procedural Rules, that Recommended Order and Decision has now become the Order and Decision of the Commission.

STATE OF ILLINOIS)
HUMAN RIGHTS COMMISSION)

Entered this 9th day of February 2010

N. KEITH CHAMBERS
EXECUTIVE DIRECTOR

STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF:	)	
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LEOPOLDO ESPARZA,	)	
	)	**Charge No. 2005CF3858**
Complainant,	)	**EEOC No. N/A**
	)	**ALS No. 07-265**
and	)	
	)	
CERTIFIED GROCERS MIDWEST,	)	
	)	**Judge Reva S. Bauch**
Respondent.	)	

RECOMMENDED ORDER AND DECISION

This matter comes before the Commission on Respondent's Motion for Summary Decision ("Motion"). Complainant filed a Response. Respondent filed a Reply. Accordingly, this matter is now ripe for a decision.

Findings of Fact

The following facts were derived from uncontested sections of the pleadings or from uncontested sections of the affidavits and other documentation submitted by the parties. The findings did not require, and were not the result of, credibility determinations. All evidence was viewed in the light most favorable to Complainant. Facts not stated herein are not deemed material.

1. On April 11, 2007, Complainant filed a Complaint alleging sexual harassment, national origin discrimination, and retaliation.

2. Complainant began his employment with Respondent on December 28, 1998.

3. Respondent has equal opportunity and anti-harassment policies which prohibit discrimination and harassment on the basis of national origin.

4. Respondent's anti-harassment policy forbids employees from engaging in sexual harassment.

5. When Complainant was hired, he signed an acknowledgement that he received a copy of Respondent's Racial/Sexual Harassment Policy.

6. Complainant was hired as a selected loader and held that position until his termination.

7. As a selected loader, Complainant was responsible for filling orders in the freezer department, which consisted of picking orders, staging orders to be loaded on to trucks, and on occasion, loading orders on to trucks.

8. During Complainant's employment, only two females worked in his department, and neither one was a selector loader.

9. Throughout his employment, Complainant was a member of the International Brotherhood of Teamsters, Local 738 ("Union").

10. Complainant was subject to the provisions of the collective bargaining agreement between Respondent and the Union, including addressing discipline.

11. Respondent's discipline program was posted in the freezer department throughout the entire time Complainant was employed by Respondent.

12. Respondent's discipline program expressly states that employees "shall not falsify any reports or records, including employment, personnel, absences, sickness, sales, or inventory records, etc." and categorizes any such offense as a Group I offense.

13. Group I offenses are the most serious violations and subject to severe discipline.

14. Complainant was issued a "mis-pick" notification form and counseled about picking from the wrong aisle on or about April 24, 2001.

15. Complainant received a disciplinary action for excessive break time on or about March 13, 2005.

16. Vince Ledesma (Caucasian/American) and Tim Judge (Caucasian/American) were involved in the same March 2005 incident and also received disciplinary actions.

17. In addition to the March 13, 2005 discipline, Complainant received at least two other disciplinary actions for excessive break time between August 4, 2004 and May 10, 2005.

18. During his employment, Complainant also received at least eleven (11) disciplinary warnings for poor attendance.

19. Complainant received disciplinary forms for low productivity based on bargained-for productivity rates on numerous occasions while employed at Respondent.

20. Complainant received disciplinary forms for low productivity on or about May 29, 2001, July 30, 2001, and September 9, 2001.

21. Complainant received a disciplinary form for low productivity on or about December 23, 2002 because his daily percent of standard on December 22, 2002 was only 40%.

22. Per the Company's Policy on Engineered Standards, employees are required to meet an 85% daily percent standard.

23. Complainant received disciplinary forms for low productivity on or about February 10, 2003, March 19, 2003, April 7, 2003, and May 19, 2003.

24. Complainant received another disciplinary form for low productivity on or about March 8, 2004 because his daily percent of standard on March 7, 2004 was only 29%.

25. Complainant received another disciplinary form for low productivity on or about December 7, 2004 because his daily percent of standard on December 6, 2004 was only 22%.

26. Complainant received another disciplinary form for low productivity on or about February 1, 2005 because his daily percent of standard on January 31, 2005 was only 23%.

27. Complainant received another disciplinary form for low productivity on or about March 15, 2005 because his daily percent of standard on March 14, 2005 was only 15%.

28. Complainant received at least twelve (12) disciplinary forms for low productivity during his employment with Respondent.

29. On or about his date of hire, Complainant reviewed a copy of the policy on engineered standards.

30. The policy on engineered standards was included as a part of the then-existing labor agreement between Respondent and the Union.

31. The policy on engineered standards required Complainant to meet an 85% productivity rating when picking orders.

32. Employees with productivity ratings lower than 85% were subject to progressive discipline for low productivity.

33. Respondent calculated productivity rating based on the time an order is signed out, the time the order is logged back in as completed, and the number of items contained on the order.

34. At the start of a shift, each selector loader in Complainant's department signed out an order.

35. After signing out an order, the selector loader then proceeded to "punch" the order in, pick all of the items listed on the order, and prepare the order for shipment.

36. After finishing an order, time permitting, the selector loader would take another order.

37. Selector loaders were required to take the next order in line and were not allowed to review orders in an effort to "cherry pick" a more desirable (easier) order.

38. Selector loaders were not allowed to trade orders.

39. Trading orders occurs when one employee signs out an order, but another employee actually picks the order.

40. If an employee is struggling to meet his daily productivity numbers, he might "trade" a larger, harder order with another employee who is meeting production standards for the day and who happened to pull a smaller or easier order.

41. By picking the easier order, the employee increases the likelihood of enhancing his productivity numbers.

42. Order trading makes it difficult for Respondent to keep accurate productivity numbers.

43. Order trading interferes with Respondent's ability to track quality control errors back to the responsible employee.

44. On May 16, 2005, Complainant traded orders.

45. On May 16, 2005, Complainant was aware that order trading was prohibited.

46. In addition to Complainant, Mike Houston, Don Cornell, Alex Palos, and David Vicenteno were also caught trading orders on or about May 16, 2005.

47. On May 17, 2005, Respondent's Department Manager Rick Stejskal interviewed Complainant to determine what had happened the night before regarding the trading of orders.

48. Stejskal also interviewed Mike Houston (Caucasian/American), Don Cornell (Caucasian/American), Alex Palos (Hispanic/Mexican), and Dave Vicenteno (Hispanic/Mexican) to determine what had happened the night before regarding the trading of orders.

49. Three member of the Union were present as representatives of the employees at the interviews with Rick Stejskal on May 17, 2005.

50. During the course of the interviews on May 17, 2005, each employee admitted that he had traded orders.

51. All five employees (Complainant, Mike Houston, Don Cornell, Alex Palos, and Dave Vicenteno) were suspended pending investigation of their violations, and all five grieved their suspensions with the Union.

52. Following the May 17, 2005 meeting, Respondent began an in-depth investigation whereby productivity reports and sign in sheets for the previous thirty (30) days were analyzed to determine if any other trading had occurred.

53. The investigation revealed that during the prior thirty (30) shifts the following had occurred: Complainant had traded orders during nineteen (19) of those thirty (30) shifts; Vicenteno traded orders during eighteen (18) of the thirty (30) shifts; Palos had traded orders during five (5) of the thirty (30) shifts; Cornell had traded orders during three (3) of the thirty (30) shifts; and Houston had traded order during three (3) of the thirty (30) shifts.

54. Respondent met with the Union to review the results of the investigation.

55. Respondent and the Union agreed that Complainant and Vicenteno's falsification of orders through trading was far more egregious than that of any other employee in Complainant's department.

56. Complainant and Vicenteno were terminated on May 25, 2005.

57. Houston, Cornell and Palos were returned to work following their unpaid suspensions.

58. Alex Palos is Mexican.

59. Complainant grieved his discharge.

60. The Union refused to purse Complainant's grievance.

61. Complainant filed an unfair labor practice charge with the National Labor Relations Board (NLRB) against the Union for its alleged failure to represent him.

62. The NLRB dismissed Complainant's charge.

63. Complainant appealed the NLRB's dismissal.

64. NLRB's Appeals Division denied that appeal.

65. On June 20, 2005, Complainant filed a Charge with the Department.

66. Complainant's allegations in the Charge fail to include any claims that Wojciak made any sexual comments to him or blew him kisses.

67. Complainant's Complaint raises sexual harassment allegations.

68. While employed at Respondent, Complainant never complained of any alleged sexual harassment.

Conclusions of Law

1. Complainant is an "aggrieved party" and Respondent is an "employer" as those terms are defined in the Illinois Human Rights Act ("Act"), 775 ILCS 5/1-103(B) and 5/2-101(B).

2. Commission has jurisdiction over the parties and the subject matter of this action.

3. Complainant has failed to establish a *prima facie* case of national origin discrimination.

4. Respondent has articulated a legitimate, nondiscriminatory reason for terminating Complainant.

5. Complainant has failed to show that Respondent's reason is a pretext for discrimination.

6. Complainant has failed to establish a *prima facie* case of sexual harassment.

7. Complainant has failed to establish a *prima facie* case of retaliation.

Discussion

I. *Standards for Summary Decision*

Under Section 8-106.1 of Act, either party to a complaint may move for summary decision. **775 ILCS 5/8-106.1**. ***See also*** **56 Ill. Admin. Code §5300.735.** A summary decision is the administrative agency procedural analog to the motion for summary

judgment in the Code of Civil Procedure. **Cano v. Village of Dolton, 250 Ill App3d 130 (1993).** Such a motion should be granted when there is no genuine issue of material fact and the undisputed facts entitle the moving party to a recommended order in its favor as a matter of law. **Fitzpatrick v. Human Rights Comm'n, 267 Ill App3d 386 (1994).** The purpose of a summary judgment is not to be a substitute for trial but, rather, to determine whether a triable issue of fact exists. **Herrschner v. Xttrium Lab. Inc., 26 Ill App3d (1969).** All pleadings, depositions, affidavits, interrogatories and admissions must be strictly construed against the moving party and liberally construed against the nonmoving party. **Kolakowski v. Voris, 76 Ill App3d 453 (1979).** If the facts are not in dispute, inferences may be drawn from undisputed facts to determine if the movant is entitled to judgment as a matter of law. **Turner v. Roesner, 193 Ill App3d 482 (1990).** Where the facts are susceptible to two or more inferences, reasonable inferences must be drawn in favor of the nonmoving party. **Purdy County of Illinois v. Transportation Insurance Co., Inc., 209 Ill App3d 519 (1991).** Although not required to prove his/her case as if at hearing, a nonmoving party must provide *some* factual basis for denying the motion. **Birck v. City of Quincy, 241 Ill App3d 119 (1993).** Only evidentiary facts, and not mere conclusions of law, should be considered. **Chevrie v. Gruesen, 208 Ill App3d 881 (1991).** If a respondent supplies sworn facts that, if uncontradicted, warrant judgment in its favor as a matter of law, a complainant may not rest on his/her pleadings to create a genuine issue of material fact. **Fitzpatrick at 392.** Where the moving party's affidavits stand uncontradicted, the facts contained therein must be accepted as true and, therefore, the failure to oppose a summary judgment motion supported by affidavits by filing counter-affidavits in response is frequently fatal. **Rotzoll v. Overhead Door Corp., 289 Ill App3d 410 (1997).** Summary decision is a drastic means of resolving litigation and should be granted only if the right of the movant to judgment is clear and free from doubt. **Purtill v. Hess, 111 Ill2d 229 (1986).**

II. Analysis

There are two main methods to prove an employment discrimination case, direct and indirect. Either one or both may be used. **Sola v. Human Rights Comm'n, 316 Ill App3d 528 (2000)**. Since there is no direct evidence in this case, the indirect analysis will be used. The method of proving a charge of discrimination through indirect means was described in the U.S. Supreme Court case of **McDonnell Douglas Corp. v. Green, 411 US 792 (1973)**, and is well-established.

First, the Complainant must establish a *prima facie* showing of discrimination against him by Respondent. If he does, Respondent must articulate a legitimate, non-discriminatory reason for its actions. If this is done, the Complainant must prove by a preponderance of the evidence that the articulated reason advanced by the Respondent is a pretext. ***See* Texas Dep't. of Community Affairs v. Burdine, 450 US 248, 254-55 (1981)**. This method of proof has been adopted by the Commission and approved by the Illinois Supreme Court. **Zaderaka v. Human Rights Comm'n, 131 Ill2d 172 (1989)**.

The issues in this case revolve around national origin discrimination, as well as sexual harassment and retaliation. In general, to establish a *prima facie* case of national origin discrimination, Complainant must prove: (1) he is in a protected class; (2) he was meeting Respondent's legitimate performance expectations; (3) Respondent took an adverse action against him; and (4) similarly-situated employees outside Complainant's protected class were treated more favorably. ***See* Orozco v. Dycast, Inc., IHRC, 7178, May 28, 2004.**

In this case, Complainant cannot establish he was meeting Respondent's legitimate performance expectations because he admitted that he traded orders in violation of Respondent's work rules. In addition, Complainant has provided no evidence of a similarly-situated employee outside of his national origin who was treated

more favorably. Accordingly, Complainant cannot establish a *prima facie* case of national origin discrimination.

Whether or not Complainant has demonstrated that he can establish a *prima facie* case, however, is not fatal. In its submissions, Respondent articulated a legitimate, non-discriminatory reason for its actions. Once such a reason is articulated, there is no need for a *prima facie* case. Instead, at that point, the decisive issue in the case becomes whether the articulated reason is pretextual. **Clyde and Caterpillar, Inc., 52 Ill. HRC Rep. 8 (1989),** *aff'd sub nom* **Clyde v. Human Rights Comm'n, 206 Ill App3d 283 (1990).**

Respondent's submissions are replete with facts documenting that Complainant was terminated because he failed to follow Respondent's work rules. Respondent's investigation revealed that Complainant traded orders, a prohibited behavior. Complainant has admitted he traded orders, a rule he knew existed. Complainant has failed to raise any factual issue which might suggest that Respondent's articulation is pretextual. Although not required to prove his case as if at hearing, Complainant must provide *some* factual basis for denying the motion. **Birck, *supra* at 123.**

Respondent submitted the Affidavits of Marcella Meister, Rick Stejskal, Alex Palos, and Jim Wojciak. Complainant failed to contradict these facts with counter-affidavits. This can be fatal. **Rotzoll, *supra* at 7**. Complainant may not rest on his pleadings once Respondent supplies sworn facts warranting a decision in its favor. In addition, because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. ***Id* at 416.** In total, Respondent has submitted 60 exhibits to support its Motion. In addition to the affidavits described above, Respondent submitted Complainant's responses to its Requests to Admit where Complainant admits facts that support Respondent's articulated reasons for terminating Complainant. Respondent also submitted numerous disciplinary forms over the years of

Complainant's employment that document violations of work rules. Thus, Complainant has failed to provide admissible evidence that would support the concept that Respondent's reasons for terminating him were pretextual.

As to the sexual harassment claim, the Act defines "sexual harassment" as:

> ... any unwelcome sexual advances or requests for sexual favors or any conduct of a sexual nature when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

775 ILCS 5/2-101(E).

Courts interpreting this provision have developed the following test for determining whether Complainant has shown sexual harassment: (1) sexual verbal or physical conduct; (2) unwelcome by the individual alleging sexual harassment; (3) has the purpose or effect of; (4) either (a) substantially interfering with the individual's work performance, or (b) creating an intimidating, hostile, or offensive working environment. **Trayling v Bd of Fire & Police Comm'ners, 273 Ill App 3d at 1 (1995).**

Respondent submitted the affidavit of Complainant's supervisor, Jim Wojciak. In his affidavit, Mr. Wojciak denies all of Complainant's allegations of sexual harassment. He denies intentionally looking at Complainant in the bathroom, making sexually explicit comments to Complainant, or blowing kisses at Complainant. Complainant failed to submit counter-affidavits or other admissible evidence to dispute Mr. Wojciak's denials. Complainant may not rest on his pleadings once Respondent supplies sworn facts warranting a decision in its favor. In addition, because Respondent's affidavits stand uncontradicted, the Commission must accept, as true, the facts contained therein. ***Id* at 416. *See* Cano, *supra* at 139** (if the party seeking summary judgment supplied facts *via*

affidavit, which, when left uncontradicted, would warrant judgment in its favor as a matter of law, the opponent may not sit idly by and rely on his pleadings to create a genuine issue of fact); ***see also*** **Estate of Budis Andernovics, 197 Ill2d 500, 508 Fn. 2 (2001)** (allegations of a verified complaint do not constitute evidence, except by way of admission, and can be of no assistance in proving a plaintiff's case). In addition, Complainant admits in his response to the Motion that the work environment was not "hostile." Rather, he states it was "uncomfortable." That does not meet the requirements for a sexual harassment claim.

To establish a claim for retaliation, the Complainant must show that: (1) he was engaged in a protected activity; (2) his employer committed a material adverse act against him; and (3) a causal nexus existed between the protected activity and the adverse act. **Hoffelt v. IDHR, 367 Ill App3d 628 (2006).** Complainant has failed to show he was engaged in a protected activity or that a causal nexus exists between a protected activity and his termination.

Recommendation

Based on the foregoing, there is no genuine issue of material fact. Respondent is entitled to a recommended order in its favor as a matter of law. Accordingly, I recommend that the Complaint be dismissed in its entirety, with prejudice.

HUMAN RIGHTS COMMISSION

BY:_____

REVA S. BAUCH
DEPUTY ADMINISTRATIVE LAW JUDGE
ADMINISTRATIVE LAW SECTION

ENTERED: June 2, 2009